UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JEFFERY R. WERNER, **Plaintiff,** **v.** **VIRALNOVA, LLC, *et al.*,** **Defendants.**	**Civil Action No. 1:15-cv-5143-AT**

PLAINTIFF JEFFERY R. WERNER'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff, Jeffery R. Werner, respectfully submits this memorandum of law in opposition to the motion by Defendant ViralNova, LLC ("ViralNova") to dismiss Mr. Werner's action in this Court in deference to a competing action filed by one of Mr. Werner's defendants in the District of Kansas.

I. STATEMENT OF FACTS

The Parties and Interested Persons

ViralNova is a limited liability company organized on March 3, 2014, under the laws of the state of Delaware. *See* ViralNova's Complaint in the District of Kansas (the "Kansas Action"), Exh. 4 to Bellingham Decl., ¶1.

ViralNova is a "clickbait" media website that primarily publishes short articles of misappropriated and unoriginal content to which it draws social media users using teaser headlines. *See* Mr. Werner's Complaint filed in the Southern District of New York, *Id.* at Exh. 1, ¶¶ 18-22 and Exh. 13. ViralNova has actively sought publicity and its own version of its history, featuring Mr. DeLong as a modern-day Horatio Alger. *Id.*, Exh. 13 to Bellingham Decl. According to press reports and ViralNova's press releases, Mr. DeLong moved its operations to New York in 2013 or early 2014 (the account shifts), hired staff, and occupied a "3,000 square-foot Midtown office space, just two blocks north of the Empire State Building." *Id.*, WER 0013. Its New York editorial office is pictured in a New York Magazine article, *id.* at WER 0015, along with pictures of Scott DeLong and Sean Beckner in ViralNova's conference room in New York. *Id.*, WER 0017. Mr. Beckner is quoted in the New York Business Journal explaining the company's unique symbiosis with New York: "New York was the hands-down place for a media company to be headquartered." *Id.*, WER 0013. In the same vein, he is quoted in the New York Magazine as saying, "Brooklyn is like a Goldmine…. Writers are actually very affordable in

New York, which is very nice." *Id.* at WER 0018. Mr. DeLong is quoted as stating, "[m]oving the site to Manhattan seemed like the perfect excuse to try out New York City..." *Id.*, WER 0015.

According to the Washington Post News Service, in "winter of 2014" Sean Beckner purchased a controlling interest in ViralNova and became its CEO. *Id.*, at WER 0018. He is listed in public filings as the managing member. *Id.* at Exh. 6. Mr. Beckner brought in an accountant, Jeff Geurts, who became Chief Financial Officer of ViralNova at the time Mr. Beckner assumed control. Mr. Geurts moved from Overland Park, Kansas, to the Oklahoma City area, in or about 2010, in order to serve as Chief Financial Officer of QuiBids, LLC.[1] According to press releases by ViralNova, and press interviews by its principals, on or about July 9, 2015, Mr. Beckner sold ViralNova to Zealot Networks for a reported $100,000,000. *Id.*, at WER 0020-31. It is expected to move its editorial offices from New York to Los Angeles. *Id.*, at WER 0027.

Mr. Werner has over 30 years of experience as a professional photographer. *See* Werner Decl. and SDNY Complaint, Exh. 1to Bellingham Decl., ¶¶ 12-17. Mr. Werner had no contacts with Kansas relating to his infringement claims and, to the best of his recollection, he has never had any contacts whatsoever with Kansas. *See* Decls. of Werner and Wolff.

The Infringements

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[1] The QuiBids entities, which sell appliances on the internet using a "penny auction" process, are mired in litigation alleging consumer fraud, fraudulent misrepresentation, unauthorized credit card charges, copyright infringement, and illegal on-line gambling. *See* 1:13-Cv-01424 (D.Colo.); 8:12-Cv-01216 (C.D.Cal.); 5:12-Cv-00786 (W.D. Okla.); 5:12-Cv-00134 (W.D.Okla.); 2:11-Cv-01299 (W.D.Wash.); 5:10-Cv-01277 (W.D.Okla.); 1:10-Cv-05686 (S.D.N.Y.); 5:10-Cv-00639 (W.D.Okla.); and 30-2012-00578561-CU-MT-CXC (Cal.Superior).

In his SDNY Complaint Mr. Werner alleged that, on October 24, 2013, ViralNova posted a feature allegedly authored by Sara Heddleston titled, “I Love George, the 7 Foot Tall Great Dane. Unfortunately, That’s Why I’m in Tears Now”. That feature exploited pirated images owned by Mr. Werner who registered his copyright in them at No. VAu 1-005-177. *See* Exh. 1 to Bellingham Decl., ¶¶ 23-28.

On April 10, 2014, ViralNova posted a feature allegedly authored by Sara Heddleston titled, “These Animals are the Largest of their Kind…And I Won’t Sleep for a Week After Seeing Them”. That feature exploited a pirated image owned by Mr. Werner who registered his copyright in it at No. VAu 1-005-177, and it also stripped out the copyright management information (“CMI”) watermark that had been on the work. *Id.* at ¶¶ 29-32.

On January 6, 2014, ViralNova posted a feature allegedly authored by Sara Heddleston titled, “You Haven’t Seen A Religious Nutcase Til You See This Scooter-Riding Jesus” (the “Inri Christo Infringing Works”). That feature exploited pirated images owned by Mr. Werner who registered his copyright in it at No. VAu 1-909-977. *Id.* at ¶¶ 33-39.

On October 28, 2014, ViralNova posted a feature under the title, “If You’re Afraid of Learning to Surf, Get Inspired by These Animals” (the “Goatee Infringing Work”). The feature consisted of sixteen captioned images of surfing animals. That feature exploited two pirated images owned by Mr. Werner who registered his copyrights in them at No. VAu 1-803-445 (a photograph) and No. PA 1-773-623 (a video still). *Id.* at ¶¶ 40-47.

At the time of the alleged infringements (October 24, 2013; January 6, 2014; October 28, 2014; and April 10, 2014) ViralNova conducted its internet publishing business at offices located at 35 West 36th Street, Suite 9W, New York, NY 10018.

Mr. Werner's Demand and Negotiations with ViralNova's Representatives in New York, Oklahoma, and Texas

On discovering ViralNova's infringement, Brian R. Wolff ("Mr. Wolff"), a licensing agent for Mr. Werner and Incredible Features, Inc., sent a cease and desist letter on Mr. Werner's behalf to ViralNova's offices in New York City dated March 6, 2015. *See* Wolff Decl., ¶7. The demand letter was delivered to ViralNova's offices in New York City. *Id.* In response, Scott DeLong emailed Mr. Wolff, on March 12, 2015, stating: "I received the Cease and Desist letter at our New York office today regarding ViralNova.com's image usage." That message did not set forth address information that is customarily provided in business emails. *Id.* at ¶9.

Between March 13, 2015 and April 7, 2015, Mr. Wolff attempted to negotiate Mr. Werner's claim in a series of emailed and telephone contacts with ViralNova officers DeLong, Beckner, and Geurts. *See Id.* at ¶¶10-24. None of Mr. Wolf's communications were knowingly directed to Kansas. *Id.* Mr. Wolff believed that both Mr. Geurts and Mr. Beckner were in New York City, where ViralNova maintained its offices, and he repeatedly attempted to arrange a meeting in New York. *Id*. ViralNova's officers encouraged Mr. Wolff to believe they were in New York until, when pressed for a meeting there, Mr. Geurts finally admitted that he was actually in Oklahoma. *Id.*

On April 13, 2015, Mr. Wolff received an email from Jason Wietjes, Esquire, a lawyer for ViralNova who was located in Dallas, Texas. *Id.* at ¶26. Mr. Wietjes then took over negotiations on behalf of ViralNova. *Id.* There followed a month and a half of unproductive discussion between Mr. Wolff and Mr. Wietjes. On June 1, 2015, Mr. Wietjes wrote: "I think it would be helpful for me to speak to Mr. Werner's legal counsel. Can you please let me know who I need to contact?" *Id.* at ¶28. Later in the exchange, Mr. Wietjes wrote: "I trust that your attorney has a full understanding of the issues and the dynamics of your demand and would be able to assist us in resolving the matter. Just let me know who to contact and I'll reach out." *Id.* at ¶29. On June 2, 2015, Mr. Wietjes wrote: "It's time for me to speak with legal counsel, as you don't understand copyright damages or licensing. Please let me know who to contact so we can resolve this." *Id.* at ¶30. Mr. Wolff responded that "Mr. Werner will turn this over to counsel tomorrow for the purpose of filing a claim…" *Id.* at ¶31. Mr. Wietjes urged him to, instead, have plaintiff's counsel contact him: "Please have legal counsel contact me." *Id.* at ¶32.

On June 4, 2015, legal counsel for Mr. Werner, Bruce Bellingham, emailed a letter to Mr. Wietjes explaining that Mr. Werner "has referred me his copyright infringement claims against Viral Nova, Scott DeLong, Sara Heddleston, and other individuals presently unknown." *See* Bellingham Decl., at ¶3. The letter then set forth the bases for Mr. Werner's damages claims and concluded: "I am happy to have pre-complaint discussion of facts or law concerning the merits of Mr. Werner's copyright infringement claims and any defenses thereto that I am not now aware of."

In a responsive email dated June 5, 2015, Mr. Wietjes wrote: "Thank you for reaching out to me. I have forwarded the correspondence to my client, and will provide you with a response in the short term. I look forward to working with you to resolve this matter." *Id.* at ¶6. However, on June 10, 2014, instead of providing the promised response after corresponding with his client, Mr. Wietjes sent a letter styled as his "response to your correspondence of June 4, 2015…." Mr. Wietjes wrote, "[a]s a courtesy, we're providing you with a copy of ViralNova's original complaint seeking a declaratory judgment that was filed today in the District of Kansas." *Id.* at ¶7.

ViralNova's Complaint for Declaratory Judgment in Kansas

The complaint in this Court by ViralNova against Mr. Werner (the "Kansas Action") makes no reference to Scott DeLong and Sara Heddleston, persons whom Mr. Werner's counsel identified as Mr. Werner's potential infringement defendants. *Id.* at Exh. 4. In his letter dated June 10, 2015, Mr. Wietjes wrote: "I haven't been retained to represent Scott DeLong, Sara Heddleston, or any other individual, in their individual capacity or otherwise, with respect to these [Werner's] allegations." *Id.* at ¶10.

The Kansas Action complaint contains a singular non-infringment cause of action for declaratory judgment, asking the court to determine whether ViralNova has infringed on Mr. Werner's registrations. ViralNova does not seek any damages in its action.

The sole allegation of personal jurisdiction over Mr. Werner in the District of Kansas is:

> 4. This Court has personal jurisdiction over Mr. Werner because he has purposely availed himself of the laws of the State of Kansas and the cause of action asserted herein arises out of Mr. Werner's specific contacts with, and conduct in, the State of Kansas, and he is seeking to enforce copyright registrations against ViralNova in Kansas and is seeking damages for alleged infringement of such copyright registrations. Mr. Werner has minimal contacts with the State of Kansa and it would not offend notions of due process, fair play, and substantial justice for him to be brought before this Court.

The sole allegation of venue in the District of Kansas is:

> 5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2).

The Kansas Action complaint filed on June 10, 2015, averred that:

> 1. ViralNova is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business at 12722 Flint Lane, Overland Park, Kansas 66209.

It also averred, at paragraph 6, that ViralNova is "[b]ased in Overland Park…"

The Kansas Action was served on Mr. Werner on July 21, 2015.

Facts Relevant to Jurisdictional Representations in ViralNova's Complaint

According to the Johnson County Tax Appraiser's Office, 12722 Flint Lane, Overland Park, Kansas, is a single family residence owned and occupied by Sean P. Beckner and his family. *Id.* at ¶12.

Pursuant to K.S.A. 17-7931, foreign entities such as ViralNova must register to do business with the Kansas Secretary of State. ViralNova was not registered with the Secretary of State to do business in Kansas on June 10, 2015, the date it filed its declaratory judgment action in the District of Kansas. In its subsequent Foreign Limited Liability Company Application with the Secretary of State, dated June 16, 2015, ViralNova had to state precisely, to the day, when it "[b]egan doing business in Kansas" as tax consequences may follow from the answer. *Id.* at ¶15.

Pursuant to K.S.A. § 17-7909(a), ViralNova's Application to the Secretary of State "shall constitute an oath or affirmation, under the penalties of perjury, that the facts stated in the document are true…" The Application was signed by Sean Beckner. *Id.* To avoid taxes for any earlier period of unlawful business activity in Kansas, or because it was true, he averred under oath that ViralNova first began to do business in Kansas "[u]pon qualification" on June 16, 2015. Accordingly, ViralNova had no business presence in Kansas on June 10, 2015, when it commenced its Kansas Action representing that ViralNova's business at that time was "[b]ased in Overland Park…" and that Mr. Beckner's family residence was then the "principal place of business" of ViralNova, a company that sold less than a month later for a reported $100,000,000.

In ViralNova's Foreign Limited Liability Company Application, Mr. Beckner also averred under oath that 12722 Flint Lane in Overland Park, Kansas, was the personal address of the individual in whom management of the LLC vests, but that the mailing address of the business was 2000 W. Danforth Road, Suite 130, Box 140, Edmond, Oklahoma, 73003. *Id.*

Though that averment was untruthful – on June 16, 2015, this media publisher had its only editorial office, and employed its entire editorial and production staff, in New York City – it is, at least, an admission that ViralNova's principal place of business was not Mr. Beckner's family home.

Pursuant to the Kansas "Closed-door" statute, K.S.A. 17-76,126, an out-of-state limited-liability company "doing business in the State of Kansas may not maintain any action, suit or proceeding" in Kansas "until it has registered in this state" and paid all "fees due for having done business in Kansas without having registered to do so." ViralNova was not qualified to commence any legal action in Kansas on June 10, 2015. ViralNova did not then dismiss its original, unlawfully-filed action in favor of a later-filed action that it was qualified to commence after it registered and allegedly began doing business in Kansas on or after June 16, 2015.

As late as August 18, 2015, ViralNova provided Dunn & Bradstreet with information stating that ViralNova, LLC's corporate address was in Edmond, Oklahoma. *Id.* ¶ 19.

Mr. Werner's Substantive Damages Action for Copyright Infringement in this Court

On July 2, 2015, Mr. Werner filed this action for copyright infringement against ViralNova, Scott DeLong, and Sara Heddleston in the Southern District of New York docketed (the "SDNY Action"). That action seeks injunctive relief and money damages against three defendants. The two individual defendants, Mr. DeLong and Ms. Heddleston, then resided in New York.

The SDNY Action was served on ViralNova on July 16, 2015. *Id.*, ¶ 21.

II. ARGUMENT

The substantive copyright infringement action for damages against three defendants was brought in this Court by the natural plaintiff in the locus of the disputed events. It should not be dismissed in deference to a putative first-filed anticipatory declaratory judgement action brought by one of the defendants in a remote venue lacking personal jurisdiction over either Mr. Werner or his individual defendants.

A. First to File Presumption

1. Courts with Second-Filed Actions May Decide Whether to Retain Jurisdiction

Even if this action is second-filed, which is denied below, this Court has discretion to decide whether to retain jurisdiction over this matter even if it credits Defendants' mistaken belief (discussed below) that ViralNova has a "first-filed" declaratory judgment action pending in the District of Kansas. A current statement of Second Circuit law on this point is as follows:

> Although one court has described the preference for a decision by the first-filed court as a "bright-line rule," *MSK Ins., Ltd. v. Emp'rs Reins. Corp.,* 212 F.Supp.2d 266, 267 (S.D.N.Y.2002) (Buchwald, J.), it is more accurately characterized as a sound guideline that courts may nevertheless decline to follow where the wise administration of justice so requires. The core of the first-filed rule is the principle of sound judicial administration. *See First City Nat'l Bank & Trust Co. v. Simmons,* 878 F.2d 76, 80 (2d Cir.1989) ("The first to file rule embodies considerations of judicial administration and conservation of resources."). "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems" as those created by the initiation of multiple parallel suits. *Kerotest Mfg. Co. v. C–O Two Fire Equip. Co.,* 342 U.S. 180, 183 (1951); *William Gluckin & Co.,* 407 F.2d at 179. In some situations, the principle of sound judicial administration may dictate that the court adjudicating the second-filed action is the appropriate court to determine the proper forum.

Michael Miller Fabrics, LLC v. Studio Imports Ltd., Inc., 2012 WL 2065294, at *4 (S.D.N.Y. June 7, 2012). The rule in the Second Circuit is: "[t]he complex problems that can arise from multiple federal filings do not lend themselves to a rigid test, but require instead that the district court consider the equities of the situation when exercising its discretion." *Curtis v. Citibank, N.A.,* 226 F.3d 133, 138 (2d Cir. 2006).

Accordingly, in considering motions to stay, dismiss, or transfer to the forum of a first-filed case, courts presiding over second-filed cases in the Second Circuit consider and have discretion to reject the first-filed rule in determining the appropriate forum. *See N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 112 (2d Cir. 2010) (court of second-filed action properly denied motion to transfer based on "first filed" rule because "the first-filed rule is only a presumption that may be rebutted by proof of desirability of proceeding in the forum of the second-filed action"); *William Gluckin & Co. v. Int'l Playtex Corp.*, 407 F.2d 177, 179-80 (2d Cir. 1969) (enjoining first-filed action in Georgia when trial court "found Playtex's reasons for bringing suit against Woolworth in Georgia 'not very persuasive'" and "[t]he 'whole of the war and all the parties to it' are in the Southern District of New York"); *Dornoch Ltd. ex rel. Underwriting Members of Lloyd's Synd. 1209 v. PBM Holdings, Inc.*, 666 F. Supp. 2d 366, 370-71 (S.D.N.Y. 2009) (court in second-filed New York action decided motion to dismiss based on first-filed rule because the short length of time between the filing of the two actions and bad faith of defendant in filing first action in Virginia despite New York forum selection provision); *Raytheon Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 306 F. Supp. 2d 346, 353 (S.D.N.Y. 2004) ("while the rule articulated in *MSK* is *generally* followed, where circumstances have warranted deviation, courts in this district have departed from the rule.") (original emphasis); *Everest Capital Ltd. v. Everest Funds Mgmt., L.L.C.*, 178 F. Supp. 2d 459, 465 (S.D.N.Y. 2002) ("It is within the sound discretion of the district court [of the second-filed case] to determine whether substantive factors, including the balance of convenience, weigh against proceeding in the forum of the first filed action."); *Elbex Video, Ltd. v. Tecton, Ltd.*, No. 00 CV 0673, 2000 WL 1708189 (S.D.N.Y. Nov. 15, 2000) (court adjudicating the second-filed suit declined to transfer or dismiss the second-filed complaint and ordered the litigation to proceed in the second-filed district and invited Central District of California court to transfer case to this District); *Mass v. McClenahan*, No. 93 CV 3290, 1993 WL 267418, at *2 (S.D.N.Y. July 9, 1993) ("If plaintiff's [action] were the first-filed action, this Court could clearly stay proceedings in the Nevada action.... That discretion should not be diminished because defendants filed a preemptive declaratory judgment action."); *Sotheby's, Inc. v. Garcia*, 802 F.Supp. 1058, 1065–66 (S.D.N.Y.1992) (second-filed court deciding that movant had demonstrated "special circumstances" exception to the first to file rule and enjoining proceedings in first-filed court).

2. ViralNova Cannot Claim "First-Filed" Priority

a. The Kansas Action was Incurably Defective

Foreign entities must register to do business with the Kansas Secretary of State. K.S.A. 17-7931. The Kansas "Closed-door" statute "provides that an out-of-state limited-liability company 'doing business in the State of Kansas may not maintain any action, suit or proceeding' here 'until it has registered in this state' and paid all fees due for having done business in Kansas without having registered to do so.'" *Douglas Landscape & Design, L.L.C. v. Miles*, 2015 WL 4681131, at *3 (Kan. Ct. App. Aug. 7, 2015); *see* K.S.A. 17-76,126. ViralNova's Kansas Complaint admits that it is a Delaware LLC. It was required to comply with the registration provisions of K.S.A. 17-76,126 as a condition for maintaining an action in a federal court sitting in Kansas. *Amp Mgmt., LLC v. Scottsdale Ins. Co.*, 2007 WL 677633, at *1 (D. Kan. Feb. 28, 2007).

When Plaintiff commenced its declaratory action on June 10, 2015, it had not complied with the registration requirements of K.S.A. 17-76,126. On June 16, 2015, Plaintiff registered to do business in Kansas. Mr. Beckner then averred under oath to the Kansas Secretary of State that the first day ViralNova did business in Kansas was the date of its qualification, June 16, 2015.

Three conclusions follow. First, no Plaintiff can ever win a "first to file" dispute based on an unlawful filing. *Med-Tec Iowa, Inc. v. Nomos Corp.*, 76 F. Supp. 2d 962, 968 (N.D. Iowa 1999) (for priority analysis, "'the first court in which jurisdiction attaches' means the first court in which a civil action is properly commenced.”); *Wallace Computer Servs., Inc. v. Moore Corp.*, 1995 WL 542471, at *1 (S.D.N.Y. Sept. 13, 1995) (“In order to adjudicate the parties' claims concerning the priority of the Delaware action as a first-filed action, the Court would be required to consider whether the Delaware action constitutes a timely and properly filed claim.”)

Second, ViralNova cannot cure the defect in its June 10, 2015 action by coming into compliance through a subsequent registration for a period that *post-dates* its improper filing, and by *not* paying back-taxes and penalties for a period of alleged unlawful operation in Kansas during which the Kansas Action was filed. *Associated Commc'ns & Research Servs., Inc. v. Kansas Pers. Commc'ns Servs.*, 31 F. Supp. 2d 949, 951 (D. Kan. 1998) (plaintiff could come into compliance by (1) subsequent registration and (2) payment of taxes and penalties incurred *during period of unlawful operation*.) As ViralNova’s subsequent registration avers that it was *not* doing business in Kansas until June 16, 2015, nothing could cure the defect in this action where the claim of jurisdiction is premised on Kansas being ViralNova’s “principal place of business” on June 10, 2015, a time when, Mr. Beckner has averred on oath, it did no business in the state. Moreover, in its subsequent registration, ViralNova averred that its true location was in Oklahoma, and that the Overland Park address was, in truth, merely the personal address of its manager.

Third, judicial estoppel applies where ViralNova represented to a tribunal that its principal place of business was Kansas in order to gain a first-to-file litigation advantage on a date when, as it subsequently admitted upon oath, it was not present in Kansas. *United States v. Kinder Morgan Co.*, 2005 WL 3157998, at *3 (D. Colo. Nov. 21, 2005) (“I conclude that these considerations of equity call for the application of judicial estoppel to prevent the Plaintiffs from asserting an inconsistent position to block the application of the first-to-file rule in this case.”)

b. This Court was the First to Establish Jurisdiction over the Parties and the Differences are De Minimus

The Second Circuit has not clearly settled the issue, but it appears to hold that priority is generally given to the first court to gain jurisdiction over both the subject matter and the parties by service:

> The bulk of authority supports the position that when a case is brought in one federal district court, and the case so brought embraces essentially the same transactions as those in a case pending in another federal district court, the latter court may enjoin the suitor in the more recently commenced case from taking any further action in the prosecution of that case.... This necessarily follows from the basic proposition that the first court to obtain jurisdiction of the parties and of the issues should have priority over a second court to do so.

National Equip. Rental, Ltd. v. Fowler, 287 F.2d 43, 45 (2d Cir. 1961) (citations omitted); *see also AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 725–26 (2d Cir.2010) ("We have recognized 'the basic proposition that the first court to obtain jurisdiction of the parties and of the issues should have priority over a second court to do so.'"); *AEI Life, LLC v. Lincoln Ben. Life Co.,* 305 F.R.D. 37, 44-45 (E.D.N.Y. 2015) ("It is not the case first filed that has precedence; rather, it is the court that first obtains jurisdiction over the parties and the issues that should normally proceed with the litigation."); *Masluf Realty Corp. v. Markel Ins. Corp.*, 2014 WL 1278102, at *4 (E.D.N.Y. Mar. 27, 2014) ("It would be unjust to permit Plaintiff Masluf to benefit from the "first-filed" rule where, but for its success in resisting the effectuation of service, Defendant MIC might have effected service in the New Jersey Action some time ago."); *but see Interwood Mktg. Ltd. v. Media Arts Int'l, Ltd.*, 1990 WL 209432, at *3 (S.D.N.Y. Dec. 12, 1990) (" This Court is convinced that the better view is that the filing of the complaint is the event that determines whether an action is 'first filed.'") [2]

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[2] The Circuits are split on whether "first-filed" priority requires jurisdiction over the parties. *Nat. Patent Dev. Corp. v. American Hosp. Supply*, 616 F. Supp. 114, n. 7 (S.D.N.Y. 1984) ("The Third Circuit appears to be unequivocal in its adherence to the rule that jurisdiction

Whether or not this Court has technical priority as the first with jurisdiction over the parties to the Kansas Action (ViralNova and Mr. Werner), courts in the Second Circuit may disregard uncertain, *de minimus* differences when cases are filed and/or served close in time:

> Finally, the date of filing is less important when the competing actions are filed within a short period of time. *Gibbs & Hill, Inc. v. Harbert International, Inc.*, 745 F.Supp. 993, 996 (S.D.N.Y.1990). Only twenty days elapsed between the filing of the two complaints and no discovery or other pretrial proceedings had occurred in either forum at that time. Therefore, "no judicial inefficiency or duplication of efforts will result from requiring the parties to litigate their dispute" in Delaware.

Capitol Records, Inc. v. Optical Recording Corp., 810 F. Supp. 1350, 1355 (S.D.N.Y. 1992); *see also Dornoch Ltd. ex rel. Underwriting Members of Lloyd's Synd. 1209 v. PBM Holdings, Inc.*, 666 F. Supp. 2d 366, 370-71 (S.D.N.Y. 2009) (rejecting first-filed rule in part due to the short length of time between the filing of the two actions); *Raytheon Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 306 F. Supp. 2d 346, 354 (S.D.N.Y. 2004); *JewelAm. v. Frontstep Solutions Grp.*, 2002 WL 1349754, at *1 n.1 (S.D.N.Y. June 20, 2002); *Elbex Video, Ltd. v. Tecton, Ltd.*, 2000 WL 1708189, at *3 (S.D.N.Y. Nov. 15, 2000); *Hanson PLC v. Metro–Goldwyn–Mayer Inc.*, 932 F.Supp. 104, 107 (S.D.N.Y.1996); *Symbol Technologies, Inc. v. Data General Corp.*, 1996 WL 339996, at *1 (S.D.N.Y. June 20, 1996); *Ontel Products, Inc. v. Project Strategies Corp.*, 899 F.Supp. 1144, 1153 (S.D.N.Y.1995).

Here, ViralNova filed its bare-bones declaratory judgment action in Kansas on June 10, 2015 and served it on July 21. Mr. Werner filed his detailed damages action against three

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must be acquired over the parties before a case may be considered 'first filed.'"); *Red Wing Shoe Co. v. B-JAYS USA, Inc.*, 2002 WL 1398538, at *2 (D. Minn. June 26, 2002) ("jurisdiction in New York did not attach until Red Wing was formally served on January 25, 2002; jurisdiction in Minnesota attached when B-JAYS was served on January 28, 2002."); *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 930 F. Supp. 1317, 1327 (D. Minn. 1996) (same); *Rebstock v. Ferrari*, 1989 WL 30260, at *3 (E.D.La. Mar. 28, 1989) (same); *Jefferson Ward Stores, Inc. v. Doody Co.*, 560 F.Supp. 35, 37 (E.D.Pa.1983) (same).

defendants in this Court on July 2, 2015, and served it on ViralNova on July 16, 2015. This Court was first to have jurisdiction over the subject matter *and* the parties present in the Kansas Action. Regardless, under the law of the Second Circuit, trivial differences afford no basis for mechanically according priority to the Kansas Action without *first* considering equities and the balance of convenience. *Ivy–Mar Co., Inc. v. Weber–Stephens Prods. Co.,* 1993 WL 535166 (S.D.N.Y. Dec. 22, 1993) (first-filed rule applied to permit action first filed but second served to go forward where traditional venue factors did not favor the other forum). There is "almost uniform recognition, however, of the general principle that mechanical application of a rule should not be determinative of the result in cases in which competing actions have been filed in close temporal proximity and service was not completed in the first case before the second was filed." *Everest Capital Ltd. v. Everest Funds Mgmt., L.L.C.*, 178 F. Supp. 2d 459, 463 (S.D.N.Y. 2002). One underlying principle "present through each of these cases, however, is that mechanical application of rules should not determine the results in such cases." *Masluf Realty*, 2014 WL 1278102, at *4.

3. Establishing Priority Among Competing Suits

Where "'essentially the same lawsuit involving the same parties and the same issues' is pending in two different federal courts, the 'first-filed rule' creates a presumption that the case filed earliest will take priority." *Employers Ins. of Wausau v. News Corp.,* 439 F.Supp.2d 328, 333 (S.D.N.Y.2006); *see also N.Y. Marine*, 599 F.3d at 113 ("the first-filed rule is only a presumption that may be rebutted by proof of the desirability of proceeding in the forum of the second-filed action.") The court that first acquires jurisdiction over the parties and subject matter should ordinarily have priority unless special factors lead the court, in its discretion, to reject the first-filed party's bid for priority. *Michael Miller Fabrics*, 2012 WL 2065294, at *2. Common examples of special factors include "where the first-filed lawsuit is an improper anticipatory declaratory judgment action" and "where forum shopping *alone* motivated the choice of the situs for the first suit." *Employers Ins.*, 522 F.3d at 275-76. "[M]anipulative or deceptive behavior on the part of the first-filing plaintiff" is also a special factor). *New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 112 (2d Cir. 2010).

If there are no such special circumstances, the court in the second-filed action should proceed to a balance of convenience analysis that uses the same factors as a motion to transfer venue under 28 U.S.C. § 1404(a). *Employers Ins.*, 522 F.3d at 275.

a. Special Circumstances Support Retention of Jurisdiction over this Action

The first-to-file presumption more often than not gives way in the context of a coercive action filed by the natural plaintiff subsequent to a declaratory action. The Second Circuit has indicated a special circumstance arises where a "declaratory judgment action has been triggered by a notice letter." *Factors Etc., Inc. v. Pro Arts, Inc.,* 579 F.2d 215, 219 (2d Cir.1978), *abrog'd on other grounds* by *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990). Cases construing the interplay between declaratory judgment actions and suits based on the merits of underlying substantive claims create, in practical effect, a presumption in favor of the substantive suit. *AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465, 470 (S.D.N.Y. 2010) ("when "a party sends a notice-of-suit letter to its opponent, and the opponent thereby files a declaratory judgment action, there is reason to find that the first-filed action is an anticipatory filing.") (citation omitted); *see also Coop. Centrale Raiffeisen-Boerenleen Bank B.A. v. Nw. Nat'l Ins. Co. of Milwaukee, Wis.*, 778 F. Supp. 1274, 1278 (S.D.N.Y. 1991). Anticipatory declaratory judgment actions are often treated as inherently "manipulative and deceptive." *Thomas v. Apple–Metro, Inc.*, 2015 WL 505384, at *3

(S.D.N.Y. Feb. 5, 2015) (special circumstances "include manipulative or deceptive behavior by the first-filing plaintiff (e.g., when the first lawsuit is an improper anticipatory declaratory judgment action))."

One rationale for disregarding anticipatory actions is fairness: "Indeed, 'where a party is prepared to pursue a lawsuit, but first desires to attempt settlement discussions, that party should not be deprived of the first-filed rule's benefit simply because its adversary used the resulting delay in filing to proceed with the mirror image of the anticipated suit.'" *Michael Miller Fabrics*, 2012 WL 2065294, at *2 (quoting *Ontel Prods.*, 899 F.Supp. at 1150; *see also Elbex Video,* 2000 WL 1708189. A second rationale is public policy favoring settlement negotiation. *Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1354 (S.D.N.Y. 1992) ("'Potential plaintiffs should be encouraged to attempt settlement discussions (in good faith and with dispatch) prior to filing lawsuits without fear that the defendant will be permitted to take advantage of the opportunity to institute litigation in a district of its own choosing' before the plaintiff files a complaint").

For a declaratory judgment action to be anticipatory, the action generally must have been filed in response to a direct threat of litigation. *CGI Solutions, LLC v. Sailtime Licensing Grp., LLC,* 2005 WL 3097533, at *3–4 (S.D.N.Y. Nov. 17, 2005) (although notice letter "did not outright announce that it would be filing suit by a particular date," its statement that the party "'may file a lawsuit seeking injunctive relief and civil damages'" "sufficiently notified Plaintiffs of its resolve to sue"); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 217–19 (2d Cir.1978) (letter stating that the opposing party would be "subject to a lawsuit for injunctive relief, damages and an accounting" unless they discontinued sales of the infringing product is sufficient notice-of-suit).

For forum shopping without an anticipatory declaratory judgment action to be a special circumstance, "the first-filing plaintiff must engage in some manipulative or deceptive behavior, or the ties between the litigation and the first forum must be so tenuous or *de minimis* that a full 'balance of convenience' analysis would not be necessary to determine that the second forum is more appropriate than the first. In other words, the evidence must show that "forum shopping *alone* motivated the choice of the situs for the first suit." *Liberty Mut. Ins. Co. v. Fairbanks Co.*, 17 F. Supp. 3d 385, 394 (S.D.N.Y. 2014) (citation omitted).

ViralNova admits that it seeks a declaratory judgment because "Mr. Werner has also expressly accused ViralNova of willfully infringing the Werner registrations" and "has alleged ViralNova infringed his copyright rights…" *See* Exh. 4 to Bellingham Decl. at ¶¶ 18, 29. It admits it filed its declaratory judgment action because Mr. Werner sent a cease and desist letter then threatened litigation, then his lawyer sent another letter setting forth Werner's damages claim. *Id.* ¶¶ 17, 19-20. There is no dispute that ViralNova knew that Mr. Werner asserted copyright claims against it (and against Mr. DeLong and Ms. Heddleston) and that litigation was imminent if the parties could not reach a settlement. This is not a case where a potential defendant brought a declaratory judgment action for the purpose of avoiding future accrual of damages on a disputed claim of right.[3]

In addition, indicia of deceptive behavior are present. ViralNova admits that Mr. Werner was attempting to negotiate a licensing agreement when it filed the Kansas

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[3] ViralNova alleges, at ¶ 35 of the Kansas Action Complaint, that it "is being harmed by continued uncertainty…" That is meritless as Mr. Werner's allegations concern infringements that occurred on October 24, 2013; January 6, 2014; October 28, 2014; and April 10, 2014. ViralNova does not contend that it is presently relying on is putatively authorized use of those works. Indeed, ViralNova agreed to take down the accused works on March 13, 2015. *See* Exh. 4 to Wolff Decl. The only "uncertainty" concerned the cost of a back-license or the amount of already-accrued damages if infringement was found.

Action. *Id.* at 17-18, 21. Its multiple requests to initiate negotiations between counsel, then its lawyer's assurance to Mr. Werner's counsel that "I have forwarded the correspondence to my client, and will provide you with a response in the short term. I look forward to working with you to resolve this matter" was intended to induce Mr. Werner to believe that negotiations were in process when, in truth, ViralNova was surrepticiously racing to the courthouse. Bellingham Decl. ¶6. Further, Mr. Werner disclosed to ViralNova that his defendants included ViralNova's founder and CEO, and its editor in chief. Filing a declaratory judgment action on behalf of ViralNova only, in a jurisdiction in which Mr. Werner could not establish personal jurisdiction over those individual insiders were he to file a damages counterclaim, was manipulative.

Moreover, bringing the action in Kansas, a forum remote from ViralNova's editorial office in New York where the infringements occurred; remote from every document and witness, all located in New York (unless recently moved or spoliated); and remote from Mr. Werner's individual defendants – ViralNova's founder and CEO at all relevant times, and its editor-in-chief who purported to be the author of Mr. Werner's copied works – indicates pure forum shopping. Indeed, at the time the Kansas Action was filed, ViralNova had no presence if Kansas, as Mr. Beckner subsequently admitted upon oath. *Id.* at ¶15. One struggles to imagine a more tenuous relationship to a forum.

b. The Balance of Conveniences Supports Retention of Jurisdiction over this Action.

If this Court declines to find special circumstances that warrant its exercise of discretion to retain jurisdiction, the balance of convenience still requires rejection of the first-filed rule in this case. *See Employers Ins.*, 522 F.3d at 276 ("Where special circumstances are not present, a balancing of the conveniences is necessary”). The factors that should be considered include: (1) the convenience of witnesses, (2) the location of relevant documents and the relative ease of access to sources of proof, (3) the convenience of the parties, (4) the locus of the operative facts, (5) the availability of process to compel attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiffs choice of forum, and (9) trial efficiency and the interests of justice based on the totality of the circumstances. *Pippins v. KPMG LLP*, 2011 WL 1143010, at *3 (S.D.N.Y. Mar. 21, 2011).

Applying those factors:

(1) The witnesses will be employees and former employees at ViralNova’s Manhattan offices, and the individual defendants who reside in New York City (or did at all relevant times). It would be inconvenient for them to testify in Kansas;

(2) The location of the documents is in New York, where ViralNova conducted its media business at all relevant times (unless it has subsequently moved or spoliated them, which can hardly be heard to warrant a remote transferee venue);

(3) Mr. Werner, a citizen of California, sued ViralNova in the location of its principal and, at all relevant times, only place of business in New York. It would be inconvenient for him to go to Kansas, where he has never had any contacts. It would also be inconvenient for New Yorkers DeLong and Heddleston to go to Kansas, though that analysis is a step ahead as there is no basis for personal jurisdiction over them in Kansas were Werner to file a counterclaim there;

(4) The operative facts all concern actions taken in ViralNova’s New York editorial office, whereas ViralNova had no presence in Kansas when it filed its anticipatory action;

(5) Kansas lacks process to compel any witnesses, all of whom work or worked at all relevant times, and reside or resided at all relevant times, in New York;

(6) ViralNova is a company that touts its July, 2015 sale to Zealot Network for a reported $100,000 million. Mr. Werner is a photographer who runs a small firm that attempts to support his on-going work by syndication;

(7) Both forums are no doubt able to competently handle a copyright infringement claim. That said, New York is a media and advertising industry center. Moreover, New York has a greater interest in the matter. For reasons well-illustrated by the allegations in Mr. Werner's Complaint, the business model of "clickbait" advertisers is widely understood in the publishing industry as involving large-scale copyright infringement.[4] New York has a stronger interest in adjudicating claims of alleged commercial copyright piracy in New York than does Kansas;

(8) Mr. Werner is the plaintiff in this action and, because he alleges infringement of his copyrights, he is the "natural plaintiff." *Michael Miller Fabrics,* 2012 WL 2065294, at *5 ("Michael Miller Fabrics, the plaintiff in the case before this Court, is the "natural plaintiff" in this copyright action, having initiated the contact with Studio Imports claiming copyright infringement.") He chose this forum because it was his defendants' place of residence and business in order to avoid a jurisdictional dispute that defendants have, nonetheless, contrived. That election should be credited;

(9) Efficiency and the interests of justice will be better served in the New York forum as there is no basis for personal jurisdiction over Mr. Werner, Mr. DeLong, or Ms. Heddleston in District of Kansas. Balance of convenience analysis applies 28 U.S.C. § 1404 transfer of venue analysis. That statute "allows transfer only to a district in which the action could have been brought, or where all parties consent." *In re Rolls Royce Corp.*, 775 F.3d 671, 675 (5th Cir.

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[4] *See* Exh. 13to Bellingham Decl. at WER (noting that the "business model that is more or less using copyright images" and referencing "Viral Nova founder Scott DeLong, who was able to build a website with a staggering 66 million unique viewers without generating a single scrap of original content.")

2014). ViralNova does not contend that DeLong and Heddleston consent to that jurisdiction and Werner does not consent.[5] *Columbia Pictures Indus., Inc. v. Schneider*, 435 F.Supp. 742, 751 (S.D.N.Y.1977) (questionable existence of personal jurisdiction over defendants in New York supported departure from first-filed rule in favor of proceeding in California).

III. Conclusion

For the reasons stated, Defendant ViralNova's Motion to Dismiss should be denied.

Respectfully submitted,

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[5] Mr. Werner will move the District of Kansas to dismiss or transfer the Kansas Action to this court.

CERTIFICATE OF SERVICE

I certify that on October 6, 2015, I filed the forgoing correction to a document filed on October 2, 2015 and served all counsel registered as filing users pursuant to Local Rule 5.2.

By: s/ Bruce Bellingham
Bruce Bellingham